No. 20931

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ARMAND C. FEICHTMEIR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Central District of California.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Statement.

The Appellee's brief makes five principal points to support its conclusion that the evidence supports the verdict. These points are:

(1) The Appellee established an increase in net worth which was not from non-taxable sources.

(2) The Appellee negated all possible sources of non-taxable income.

(3) The Appellee produced evidence of a likely source of taxable income.

(4) The Appellee established willfulness to defeat and evade income tax.

(5) The Appellee did not violate the Constitutional Rights of the Appellant.

The Appellant's contentions are:

(1) The Appellee has not established an increase in net worth from taxable sources.

(2) The Appellee has not negated all possible sources of non-taxable income.
(3) The Appellee has not produced evidence of a likely source of taxable income.
(4) The Appellee has not established willfulness to defeat and evade income tax.
(5) The Appellee did violate the Constitutional Rights of the Appellant.

Appellee's brief (p. 3) states: "The evidence established Appellant's net worth as follows: . . .". A schedule of the net worth is there set forth.

All that the evidence did was to establish the Government's *computation* of the Appellant's net worth as of the end of each year. The Government's computations are fraught with mistakes including errors in copying and arithmetic (Appx. C).

Appellee's brief, page 4, also states the Government "proved" computations of Appellant's corrected income and corrected tax liability for the indictment years 1958, 1959, 1960 and 1961. The Government did no more than introduce evidence of its computations of alleged corrected income and corrected tax liability. In fact, the Appellant was acquitted of the charge made in the indictment with reference to the years 1958 and 1960.

Such loose generalized statements and others throughout the Appellee's brief ignore the all inclusive issue to wit: Has it been established beyond a reasonable doubt that there was a willful omission of *taxable income* in the years 1959 and 1961.

> "Increases in net worth, standing alone cannot be assumed to be attributable to currently taxable income."
>
> *Holland v. United States,* 348 U.S. 121, 136 (1954).

ARGUMENT.

I.

The Appellee Has Not Established an Increase in Net Worth Which Was From Taxable Sources.

The items of assets and liabilities computed by the Appellee are set forth in Exhibits 82, 127 and 128. A considerable number of the items are stipulated, however, the Appellant did not and has not stipulated to the accuracy and completeness of the computations of the accumulations of currency and the cost of non-taxable municipal bonds and common stocks owned by the Appellant at the various dates. Discussion of this is contained in the record [R. T. 102-107]. (Appx. A, attached hereto).

In addition, the stipulation concerning the net worth schedule [Ex. 82, R. T. 102-107], leaves open the possibility that prior to the indictment years the Appellant had additional assets in the form of accumulations of currency, municipal bonds, and common preferred stocks and additional liabilities [R. T. 104-107].

There was no testimony that there were no assets or liabilities other than those shown on Exhibit 82.

> "The essential proof of no other assets is the cornerstone of the evidence of the government; that cornerstone being faulty, the whole edifice is so weakened as to be undependable as proof of the guilt beyond all reasonable doubt."
>
> *United States v. Fenwick* (7th Cir., 1949), 177 F. 2d 488, 492 [5-7].

II.

The Appellee Has Not Negated All Possible Sources of Non-Taxable Income.

On page 1 of Appellee's brief, under the heading "Topical Index", it states:

1. The Government satisfies its burden when it disproves the existence of a claimed non-taxable source.

This statement is not applicable, to this case for the reason that the Appellant did not claim a non-taxable source to the exclusion of all other sources. The Appellant did nothing more than make some extra-judicial statements indicating where and how certain currency had been secured for certain expenditures.

In sub-paragraphs 2 and 3 of the Topical Index on page 1, the Appellee stated that all possible sources of non-taxable income had been negated. This statement is vigorously denied and is not supported by the evidence produced at the trial.

The Appellee's brief, page 14 states, "Throughout the investigation, Appellant claimed personally and and through his counsel, that his unreported net worth increases were the result of accumulated prior earnings."

The record does not support that statement.

When the investigating agents obtained the Appellant's statement in this matter, they were not seeking an explanation of the net worth increases. Revenue Agent Helmer F. Akola, a Government witness, testified concerning a conversation he had with the Appellant on June 12, 1962 [R. T. 264]. He asked the Appellant for the source of the currency used in a $40,000 deposit to a bank account and in the purchasing of four $5,000 cashiers checks [R. T. 273]. No mention was made of net worth increases.

The Appellant indicated that it had been his practice to withdraw $500 a month in currency from his commercial account and to place the currency in a safe deposit box, but that he was unable to specify a source for the particular transactions with which the agent was concerned and he expected to explain the matter within a few days [R. T. 274]. The conversation of June 12, 1962, is at the most an ambiguous and equivocal claim of non-taxable source. It is certainly clear that neither the investigating agent nor the Appellant believed that the conversation amounted to an assertion by the Appellant that currency from a safe deposit box was the exclusive source of his net worth increases.

On page 15 of its brief, the Appellee states that in April of 1963, Appellant again offered an explanation of his expenditures. The explanation relied upon is Exhibit 81, the so-called "Fund Statement". That document, like the June 12, 1962 conversation, was prepared in response to an inquiry regarding the same two currency transactions [R. T. 58-60 and R. T. 30]. Furthermore, Exhibit 81 only purports to cover the taxable years 1953 through 1957, none of which were included in the Indictment.

Marshall G. Groener, the Government witness who prepared Exhibit 81, testified on direct examination that some of the figures on the statement were not accurate. The inaccuracy became apparent when additional records were acquired after the statement was made [R. T. 137].

To support its assertion that it was not required to negative *all possible* sources of non-taxable income because the Appellant had claimed a non-taxable source for his alleged net worth increases, the Government cites cases which apply the rule. "Where a taxpayer has committed himself to one specific explanation of

the source of funds expended . . ." and where the defendant said he had received no other funds from a non-taxable source. *Gatling v. Commissioner* (4th Cir., 1961), 286 F. 2d 139, 141; *United States v. Holovachka* (7th Cir., 1963), 314 F. 2d 345, 353.

Apart from the June 12, 1962 conversation and Exhibit 81, there is nothing in the record regarding any claim by the Appellant of a non-taxable source. Neither the June 12, 1962 conversation nor Exhibit 81 can be construed to commit the Appellant to one specific explanation of the source of all funds expended during the indictment years. The Appellant never stated that he had received no other funds from a non-taxable source.

Even if the inferences drawn by the Appellee from the June 12, 1962 conversation and Exhibit 81 are correct, they cannot serve as a substitute for proof that *all possible* sources of non-taxable income have been negatived because the conversation and the Exhibit constitute non-judicial admissions which are inadmissible unless corroborated by independent evidence of the crime charged. *Smith v. United States* (1954), 348 U.S. 147; *United States v. Calderon* (1954), 348 U.S. 160. There is no independent evidence in the record of this case to show that the crime of tax evasion has occurred.

Throughout the years the Appellant has reported and paid a tax on very substantial profits. Some of the investments were undoubtedly made from this large income, but no claim was ever made that this was the sole source of the assets comprising Appellant's net worth.

Thus, this is not a case where the Government's burden to negate all possible sources of non-taxable income can be satisfied by sources claimed by the Appellant.

Again, on page 3 of Appellee's brief, under the title of "Statement of Facts", the statement is made that the Government negated the possibility that non-taxable funds were the source of the Appellant's unreported net worth, "thus logically concluding that the net worth increases were derived from some taxable source". It is the position of the Appellant that the Government has not negated all possible sources of non-taxable income as is required under the decision of the Supreme Court in the case of *Massei v. United States,* 335 U.S. 595 (1958). It has not even negated some obvious sources.

As pointed out in this Appellant's opening brief, page 20, the District Court indicated it was entirely possible for the Appellant to have had non-taxable sources of income, particularly loans [R. T. 106-107]. In addition to the factual distinctions, the courts have clearly not used *Rossi v. United States* (1933), 289 U.S. 89 in determining the requirements of a *prima facie* case in tax evasion prosecutions. See Discussion of Rossi, App. B.

In *Holland v. United States,* 348 U.S. 121, 138 (1954), the Court used *Rossi* to indicate that if the Government could show a likely source of taxable income it was not necessary to go further and negative the many possible non-taxable sources of income. The *Massei* case, *supra,* held that where no likely source of taxable income could be shown and where there was no *undisclosed business,* the Government could prove the case by negativing all *possible* non-taxable sources. A careful review of the *Massei* case will show that *Rossi* and related cases cannot be applied to relieve the Appellee in this case of the burden to negative all possible non-taxable sources of income. The trial in *Massei* resulted in a conviction. On the defendant's appeal, the 1st Circuit reversed on the ground that no

likely source of taxable income had been proven. *Massei v. United States* (1st Cir. 1957), 241 F. 2d 895, 905. The case then reached the Supreme Court on petition of the Government. That Court affirmed the action of the 1st Circuit was a *per curiam* opinion indicating that if no likely source of taxable income could be shown, the defendant could be convicted if *all possible sources* of non-taxable income are negatived.

The case of *Yee Hem v. United States,* 268 U.S. 178 (1925) to which reference is made on page 18 of the Appellee's brief, has no application to the factual situation in this Appellant's case. The *Yee Hem* case involved illegal possession of opium. It was decided adversely to the defendant because of a specific provision in the Statute of a legal presumption that possession was in violation of law unless acceptable explanation was made to the contrary. In its opinion, the Court stated:

> "Every accused person, of course, enters upon his trial clothed with the presumption of innocence. But that presumption may be overcome, not only by direct proof, but, in many cases, when the facts standing alone are not enough, by the additional *weight of a countervailing legislative presumption.*"

In the Appellant's case we have no countervailing legislative presumption to shift the burden of proof. Furthermore, *Yee Hem* is cited in *Holland, supra,* at pages 138-139, to indicate that the burden does not shift to the defendant until the Government has made a *prima facie* case.

Wilson v. United States, 162 U.S. 613 (1896) cited on page 18 of Appellee's brief was a murder case in which defendant had been convicted and sentenced to be hanged. An examination of the case at page 616 indi-

cates that Wilson after his arrest was brought before one J. B. George a United States Commissioner where he was examined at length. The questions and answers were taken down and later offered at his trial as a confession.

Wilson did not testify at the trial but in the light of the statements he had previously made and the explanations he had made when before the United States Commissioner, the court ruled that the existence of blood stains at or near a place where violence has been inflicted is relevant and admissible in evidence and if not satisfactorily explained may be regarded by the jury as circumstances in determining whether or not a murder has been committed.

Clearly there is a rational connection between the existence of blood stains and the possible existence of a murder. However, in the Appellant's case there is no rational connection between the alleged increase in net worth and the existence of unreported income because the Appellee failed to prove a likely source or to negative non-taxable sources (see App. Br. pp. 10-14).

The Appellant's Opening Brief on pages 20 through 21, contains a detailed argument supported by references to the record that loans were a *probable* (not merely possible) source of non-taxable income which was apparent to the Government during the trial and which was an obvious "lead" which should have been checked out by the investigating agents. Apart from the assertion that the minimum amount of Appellant's liabilities during the indictment years was $80.56 [R. T. 106], the record is utterly devoid of any showing that the agents checked to see if there were additional loans during the indictment years. Certainly, if the Government's net worth computation is not specific as to the amount of liabilities, it cannot be said that the net worth computation is reliable.

The Government introduced no evidence that the amounts shown on Exhibit 82 represented the only liabilities, municipal bonds and common and preferred stocks other than closely held corporations. The Government slides over this point without mentioning loans except on pages 9 and 10 of the so-called "Statement of Facts", where there is the *unsupported* statement that the Government's investigation negated the possibility that non-taxable funds, such as loans, could account for the net worth increases.

On page 11 of the Appellee's brief, it is noted ". . . that Appellant never claimed that he saved or accumulated these funds". The possible fact that he never made such a claim to the examining officers is by no means an indication that he ". . . never claimed that he saved or accumulated these funds".

At the bottom of page 9, Appellee's brief states that the Government's "meticulous investigation negated the possibility that non-taxable funds such as loans, gifts or inheritances accounted for Appellant's unreported net worth increase of $144,000.00". The conclusion to be drawn from the record is that the examining agent did not make the intensive and exhaustive investigation required by the guide lines set forth in such cases as *United States v. Adonis* (3rd Cir., 1955), 221 F. 2d 717, or *United States v. Ford* (2nd Cir., 1956), 237 F. 2d 57 and other cases in which net worth approach has been used.

Further, Appellee's brief states: "During the indictment years, Appellant received no gifts or inheritances. Appellant's only loan was for the purchase of the apartment house in 1959." There is nothing in the evidence to support such statements to negate the possibility of gifts or inheritances received in the indictment years or to negate the possibility of additional loans at various times during the indictment years.

The evidence is clear that the Bennett family was well-to-do and had lived for many years in Des Moines, Iowa [R. T. 204]. Mr. Bennett died in 1950; prior to this time he had embarked on a program of transferring his assets and in 1950 when he died he left no estate. It is known that some of his assets were transferred to Mrs. Bennett prior to his death but there is no evidence in the record to indicate that he had not transferred some of his assets to Mrs. Peggee Feichtmeir in addition to the transfers with which Mr. Kirk Mallory (Mrs. Bennett's Trustee) subsequently became familiar. There is nothing in the evidence to indicate that the examining officers conducted any investigation of the Bennett family or of the public records in Des Moines, Iowa, concerning such possibilities.

III.

The Appellee Has Not Produced Evidence of a Likely Source.

Beginning on page 5 of the Appellee's brief, under the title "Appellant's Business Interests", the Appellee lists the enterprises in which the Appellant was engaged. The listing of Appellant's businesses does not indicate a source of omitted taxable income. The businesses were quite successful and almost completely solely owned by the Appellant. There is no evidence that the businesses were conducted improperly or that they had improperly reported income on their tax returns. There is no evidence that the businesses received income in currency nor evidence of diverted funds from the businesses to the Appellant.

On page 8 of Appellee's brief, as part of its discussion under the title "Other Investments" (p. 7), there appears a carefully worded misleading statement. The statement is as follows: "In tracing the Appel-

lant's financial history, the evidence concerns 17 separate banks or branches throughout California, in San Antonio, Texas and in Mexico City (Exhibits 13, 14-17, 41, 62-63, 71-75, 77-79, 83, 88, 91, 95, 97, 82, 101)". The Appellant did not have any bank accounts in San Antonio, Texas; he did not have a bank account in Mexico City or in any other place in Mexico and there is no evidence to the contrary in the record. By reference to the Exhibits, it will be seen that they relate largely to individual cashiers' checks, individual bank deposit tickets, individual bank signature cards and individual bank withdrawal orders from personal as well as business bank accounts. In addition, Exhibit 82 consists of the front page of the Bill of Particulars and Exhibit 101 relates to the Federal Reserve records of the issuance of certain Federal Reserve Notes.

The Appellee admits on page 21 of its brief that there are no false entries in the records of the various corporations in which the Appellant is interested. But the Appellee urges that the Appellant maintained no books for certain businesses and that therefore a likely source can be inferred. The Appellee does not designate the volume and page of the transcript from which this statement can be drawn. The facts are that there were records of all of his transactions in the business office of the Appellant except those that pertained to his personal investments in stocks and bonds and to his personal living expenditures. Appellant maintained records of personal investments consisting of cancelled checks, checkstubs and a loose leaf booklet [R. T. 67].

The Appellee for some reason cited the case of *Barsky v. United States*, 339 F. 2d 180 in support of its contention that a likely source can be inferred. It is

respectfully submitted that the facts and circumstances of the *Barsky* case are so far removed from the situation with which we are here concerned that it has no application whatever.

Appellee on page 21 states, ". . . it was also shown that Appellant was receiving money from Mexico, indicating an undisclosed Mexican business source." That statement is entirely false. All the testimony pertaining to the Mexican currency transaction was from the Government's witness, Julius L. Haufler [R. T. 254-260]. This testimony can be summarized as follows:

Mr. Haufler is a clerk in the Federal Reserve Bank in San Antonio, Texas. On three separate occasions he observed transactions in which the Frost National Bank of San Antonio, Texas obtained new currency in the form of $100 bills from the Federal Reserve Bank and in Mr. Haufler's presence delivered the currency to a representative of Banco Nacionale of Mexico City. These three withdrawals were in the following amounts: $1,999,000.00; $1,700,000.00; and $1,915,000.00. Obviously they were made in the course of normal banking transactions which in no way related to the Appellant.

Some of the same currency was, according to the record, expended by the Appellant when he purchased stocks at intervals as short as one and one-half months and as long as two years and three months after the transfer from the Federal Reserve Bank in San Antonio to the Frost National Bank and, in turn, to the Banco Nacionale. There is not a single scrap of evidence in the record from which one could infer that the Appellant had any connection whatsoever with the Banco Nacionale, or its representative, or the Federal Reserve Bank, or Mr. Haufler. There is absolutely noth-

ing to show that the Appellant received the currency from anyone in Mexico, or that he had a Mexican business. There is nothing insidious in the fact that the Appellant used currency in Los Angeles which at one time may have been in Mexico.

This court should take judicial notice of the fact that currency transferred to foreign countries sooner or later is returned to domestic use in this country.

It is respectfully submitted that no unfavorable inference is to be drawn from the fact that the Appellant frequently converted salary and other checks into currency and accumulated this currency for emergency purposes and favorable purchasing leverage in connection with business transactions. On the date (1) that the Appellant was interviewed by Revenue Agent Akola, they went together to a safe deposit box where a bundle of currency was found, the exact amount of which was not determined by the Agent, but which was topped by a hundred dollar bill. There is no support for the statement currency was received in the same year it was expended by the Appellant and no reference to the transcript appears in the Appellee's brief. It is nothing less than fantastic for Government Counsel to contend "that the currency was generated by undisclosed business interests". Considering the time involved in the investigation of this case and the extent of the available trained and skilled manpower, it is incredible for one to believe that if the Appellant was engaged in any business other than that which has been disclosed in the records of this case, that

the Intelligence Division of the Internal Revenue Service of the United States Government would be unable to find it.

IV.

The Appellee Has Not Established Willfulness to Evade and Defeat Income Tax.

The Appellee states: "The pattern of understatement and the substantiality of evaded tax are indicia of intent". In support of this, the statement is made: "Appellant evaded over 80% of his correct tax liability for 1959". This would seem to be the greatest example of a boot strap operation that could be imagined. In other words, it is assumed that the correct tax liability has been established for 1959 beyond all question of doubt and that by reason of this the inference can be drawn that the Appellant was guilty of evasion. This simply begs the question. One of the fundamental issues in the case is whether there was any unreported taxable income. Unless it is established beyond reasonable doubt that there was, there can be no willfulness.

The records show that the Appellant, Armand C. Feichtmeir is a substantial business man with an impeccable reputation who has been contributing heavily for a period of years to the support of his Government, both Federal and State. The schedule below indicates that he reported taxable income for the years 1951 to 1957 inclusive of $271,731.51 and paid a tax of $103,590.29. For the years 1958 to 1961 inclusive he reported a taxable income of $201,308.99 and paid a tax of $81,277.99. The total for the eleven year period is a taxable income reported of $473,040.50

and a tax paid of $184,868.28. The tax reported and the tax paid is reflected in the schedule below. Exhibits 127 and 128.

	Taxable Income Reported	Tax Paid
1951	9,246.77	2,004.16
1952	26,600.19	7,918.08
1953	81,133.62	40,262.20
1954	40,106.27	14,579.51
1955	35,527.51	12,116.67
1956	37,986.47	13,412.67
1957	41,130.68	15,112.28
Total	$271,731.51	$103,590.29
1958	50,472.53	20,509.84
1959	38,522.15	13,661.86
1960	48,188.06	18,494.04
1961	64,126.25	28,612.25
Total	$201,308.99	$81,277.99
Total 11 years	$473,040.50	$184,868.28

The third Mexican currency transaction, mentioned in the Appellee's brief involved a delivery on September 3, 1958 of $1,915,000.00 in one hundred dollar bills by the Frost National Bank from the Federal Reserve Bank to the Banco Nacionale in Mexico City. Twenty-three of these bills were used by the Appellant in October of 1958 in a payment to Hill Richards & Co. of Los Angeles, California. With this payment of $2,300.00 the Appellant also made a payment by a personal salary check of $1,500.00 for a total of $3,800.00 [Ex. 100]. This was done so that with a credit balance of $1,200.00 in his Hill Richards & Co. account at that time, he could secure a check from Hill Richards & Co. payable to a valued employee to whom the Appellant wished to give a bonus of $5,000.00 without knowledge

thereof reaching other employees in his business [R. T. 243, 422, 423; Ex. 6]. The use of this personal salary check in conjunction with this currency, completely negates any idea of concealment or a premeditated plan to evade taxes. Attention is again invited to the fact there is no evidence that the Appellant had any direct transactions with either the Frost National Bank or the Federal Reserve Bank of Dallas, in San Antonio nor with the Banco Nacionale in Mexico City.

There is no basis for the inference that the P.A.F. account was set up and used for personal expenditures as a means of evading his tax liability. The payments for the apartment house were made out of this account. There is, and could be, no concealment about this. This transaction and the use of this account were an open book to any investigator, State or Federal, who wanted to check the records of the banks, the title company, the escrow agents or any other entities with whom he was doing business.

The Government has the burden of proving beyond a reasonable doubt that any under-statement of tax was intentionally and wilfully done with a bad purpose and an evil motive. It must be established that there was a specific attempt to accomplish that which is contrary to law. This Court in *Bernard Bloch v. United States,* 221 F. 2d 786 (9th Cir. 1955) stated:

> "Proceeding then to a consideration of the Court's charge we find the trial Court instructed the jury in part as follows:
>
> 'The attempt must be wilful, that is, intentionally done with the intent that the government is to be defrauded of the income tax due from the defendant'.
>
> That is the correct statement of the law, because the intent involved in the offense with which appellant here was charged is a specific intent in-

volving the bad purpose and evil motive to evade or defeat the payment of his income tax. Wardlaw v. United States, 203 Fed. (2d) 884 [43 AFTR 878]."

It is respectfully submitted that the usual badges of fraud showing a specific wilful intent are not present in this case and that the verdict is not sustained by the evidence.

V.

The Appellee Did Violate the Constitutional Rights of the Appellant.

A full discussion of this issue is contained in the Appellant's opening brief pages 23-26.

The Appellee's brief on page 22 states: "The Revenue Agent did not compel the Appellant to appear, produce records, or give testimony. The provisions of Section 7602 of Title 26, were not used and it is inapplicable." Of course the agent did not cite Section 7602 to the Appellant during his interviews, however, he was certainly acting under color of *some authority* and Section 7602 is the only possible authority for the interviews.

Kohatsu v. United States (9th Cir. 1966), 351 F. 2d 898, cert. den. (June 20, 1966), should be distinguished because of the existence of the informant's letter in this case.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ALVA C. BAIRD

APPENDIX A.

Excerpt From Reporter's Transcript.

Los Angeles, California, Wednesday, December 8, 1965, 1:30 P.M.

"The Court: The defendant is present with counsel. Proceed.

Mrs. Dunne: Your Honor, before proceeding further with the stipulation, there is one point to be determined first in regard to this.

An objection has been made to the stipulation concerning assets and liabilities. The Government wishes to be sure that it does not preclude itself from offering further evidence concerning these assets and liabilities.

The Court: There will be no limitation if it goes purely to knowledge and intent. But I am not going to allow any testimony to come in—if you refuse to stipulate, I am not going to let it come in any way.

Mrs. Dunne: Yes.

The Court: So you have got no choice.

Mrs. Dunne: Yes, sir.

The Court: I am not going to just sit here, as I have seen some judges do, and let stipulations go in and then let the Government retry the whole case on all the matters that have been stipulated to.

This, in the vernacular—I won't say it, I guess I should use something about birds, but I won't.

Mrs. Dunne: In this regard, your Honor, the offer of stipulation we have marked—

The Court: Now, you understand I am not going to stop you from giving evidence.

Mrs. Dunne: All right.

The Court: Independent of the stipulation which relates to intent.

Mrs. Dunne: Right.

The Court: Or to corroborate something. But you don't need to corroborate a stipulation.

Mrs. Dunne: Yes, sir.

The Court: Because when a fact is stipulated to it becomes admitted and presumptive and that is the end of it.

Mrs. Dunne: Yes, sir.

The Court: All right. I will take the stipulation.

Mrs. Dunne: We will have to offer it in oral form.

The Court: All right. Shall I follow the motion for bill of particulars—I mean the indictment?

Mrs. Dunne: Yes.

Mr. Galen: I suggest your Honor follow the assets and liabilities sheet.

The Court: All right.

Mrs. Dunne: To clarify this, we have marked as Exhibit 82 the single page for assets and liabilities.

The Court: You are talking about the first page of the bill of particulars?

Mrs. Dunne: That is right, the first page.

The Court: This is exhibit what?

Mrs. Dunne: 82.

The Court: 82, the first page of the bill of particulars.

Proceed.

The Clerk: I have so marked it, counsel.

(The exhibit referred to was marked Plaintiff's Exhibit 82 for identification.)

Mr. Galen: I don't know that it means it is evidence of the truth of the matter stated, except as a stipulation to explain it.

The Court: Well, I don't understand you, counsel.

Mr. Galen: There are certain matters, your Honor, that are not stipulated to as a fact on Exhibit 82.

The Court: Oh, that, of course, you are stipulating—go ahead, you state it.

Mr. Galen: We are only stipulating to certain portions—

The Court: Well—

Mrs. Dunne: They are as follows, with the exception of:

Common and preferred stocks, other than closely held corporations—

The Court: Let me find—where do I find this?

Mr. Galen: Your Honor, that appears down about the 15th line, common and preferred stocks, $38,297.96.

The Court: The 15th line?

Mr. Galen: Roughly, yes—no, the 14th line.

The Court: Oh, I find it, yes.

Common and preferred stocks other than closely held corporations.

Mr. Galen: Yes.

Mrs. Dunne: And municipal bonds just above on line 23—

The Court: I will check mark this, which is not included in the stipulation.

And the next one?

Mrs. Dunne: That is the municipal bonds, your Honor, which starts at line 23.

The Court: Municipal bonds?

Mr. Galen: That is correct.

The Court: Now let me see if I understand—what is the stipulation?

Mrs. Dunne: That the assets as listed on Exhibit 82 of the year ending December 31, 1957 to December 31, 1958; December 31, 1959 to December 31, 1960; and December 31, 1961 were, in fact, owned by the defendant Armand C. Feichtmeir as listed.

The Court: And were as set forth on this exhibit?

Mrs. Dunne: Exhibit 82.

The Court: Exhibit 82.

Mrs. Dunne: And further that the amounts listed for his assets represent an actual cash outlay for certain assets of Exhibit 82.

Mr. Galen: Representing defendant's costs for the assets.

The Court: Costs of the defendant, all right.

Anything further?

Mrs. Dunne: Yes. The liabilities, as listed on Exhibit 82 for the years ending 12/31/1957; 12/31/1958; 12/31/1959; 12/31/1960; 12/31/1961, were in fact owned by the defendant Armand C. Feichtmeir.

The Court: Talking about the $80.56?

Mrs. Dunne: That is it, that is the only liability.

The Court: That is what you say. They may have a different story.

Mrs. Dunne: I said in Exhibit 82, that is right.

The Court: Oh, well, I can't imagine—it may be true that a man has only $80.56 in liabilities. Even the people on relief have that many liabilities, probably more.

Mrs. Dunne: Yes.

Have I correctly stated the stipulation, counsel?

Mr. Galen: That is correct.

The Court: That does not preclude counsel from offering evidence of the defendant to show that there were additional liabilities, I understand that; is that right?

Mrs. Dunne: That is right.

The Court: All right.

Mr. Galen: Or assets, your Honor.

Mrs. Dunne: Or assets.

The Court: Or assets.

Mr. Galen: That is right.

The Court: In other words, you may try to establish that there were additional cash or other assets?

Mr. Galen: Yes.

The Court: Very well. So stipulated.

Mrs. Dunne: Mr. Groener, will you resume the stand, please.

APPENDIX B.

Rossi v. United States (1933), 289 U.S. 89. The quotation from the Rossi case which appears on page 18 of Appellee's brief is neither precisely accurate nor complete. A sentence which is not given in full and which is lifted out of context can, and does, frequently result in a distorted meaning.

The defendant, Peter Rossi, was indicted for failure to register a still for the manufacture of alcoholic spirits and for failure to give the bond required of distillers. By referring to the decision of the C.C.A. 7th Cir. June 30, 1932, 60 Fed. 2d 955, to obtain the facts involved in the proceedings, it will be observed that under Paragraph [2] there was ample evidence to indicate that the defendant Rossi and associates were engaged in an illegal distilling operation. Having determined this, the Court concluded that an inference could be drawn that the still was not registered and that no bond of a distiller had been approved. Having established that the entire operation was illegal it follows that there could have been no registration and no bond issued as required by law.

The Court concluded that it was not incumbent on the prosecution to produce positive evidence to show that the still had not been registered for the manufacture of alcoholic spirits or that a bond had been given as required by the Statute.

APPENDIX C.

Miscellaneous Errors in Appellee's Brief.

(1) For examples: The addition of the items shown in Exhibit 127 comprising the Government's computation of the Appellant's net worth at 12/31/50 is in error by $5,000.00. The figure shown for the Appellant's cost of common stocks held at 12/31/50 is also in error [Exs. 123 and 127].

The statement on page 5 that the program of non-occupational insurance for braceros and agricultural laborers had expanded by *1961* so that the Appellant insured all but two Growers in the State of California is incorrect. The facts are, that the program had expanded as early as *1951* at which time all but two *associations of Growers* (not just two Growers) in the State of California were insured by the Appellant.

On page 9 of Appellee's brief, it is stated that in 1950 Appellant purchased a home for $34,000.00. This is in error. The cost of the home was only $24,000.00 as indicated in the Government's net worth computation Exhibit 128. The home was owned by the Appellant on December 31, 1961, so no effect on the Appellant's income resulted from the error, but the error is indicative of the mis-statements which appear throughout the Appellee's brief.

On page 8, the statement is made "his investments increased in value from $1,786.60 as of December 31, 1950 to $93,775.81 as of December 31, 1961. Exhibit 127 in evidence lists the starting figure at $17,866.02 rather than $1,786.60. Moreover, there is nothing in the evidence to indicate that the Government agents had negated the possibility of additional common stocks being owned by the Appellant at December 31, 1950.